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**In the  
Supreme Court of the United States**

**OCTOBER TERM, 1979**

**No. 79-517**

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**ESCHMANN BROS. & WALSH, LTD.,**

*Petitioner*

**VS.**

**V. MUELLER & CO.,**

*Respondent*

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**BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

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**I. QUESTION PRESENTED**

As stated in the Petition, the "basic question" is whether a state court may constitutionally exercise in personam jurisdiction over a foreign corporation based upon a long-arm statute which confers jurisdiction upon the commission of a tortious act within the state.

## II. CONSTITUTIONAL AND STATUTORY PROVISIONS

The federal constitutional and state statutory provisions which are involved in this Petition are as follows:

The due process clause of the Fourteenth Amendment to the Constitution of the United States of America:

. . . nor shall any state deprive any person of life, liberty, or property, without due process of law.

The following portion of the Colorado long-arm statute, 1973 CRS 13-1-124 (1) (b):

Engaging in any act enumerated in this section by any person . . . submits such person . . . to the jurisdiction of the Courts of this state concerning any cause of action arising from . . . the commission of a tortious act within this state . . . .

## III. STATEMENT OF THE CASE

The parties to this proceeding are petitioner Eschmann Bros. & Walsh, Ltd. (Eschmann), and respondent V. Mueller & Co. (Mueller).

The subject of this proceeding arises from a medical malpractice and products liability action filed in state court. The plaintiff claimed that she sustained injuries arising from the use of a medical instrument during a surgical procedure.

The plaintiff's complaint included claims against Mueller, alleging that Mueller manufactured the surgical instrument and is liable to plaintiff under a theory of products liability. Mueller answered and filed a third-party complaint against Eschmann, alleging that if any defect existed in the surgical instrument, the defect was in a component part which was manufactured by Eschmann and sold to Mueller.

Eschmann, a foreign corporation with its principal offices in the United Kingdom, was served with process at its

London, England office. Eschmann entered a special appearance and filed a motion to quash service of process for lack of personal jurisdiction. The trial court granted the motion and also dismissed the third-party complaint.

Mueller appealed the decision of the trial court to the Colorado Court of Appeals, which reversed the trial court and upheld the exercise of personal jurisdiction over Eschmann. Eschmann filed a petition for writ of certiorari to the Colorado Supreme Court. The petition was denied, and Eschmann now brings this Petition for Writ of Certiorari.

## IV. ARGUMENT

Eschmann questions the constitutionality of Colorado's long-arm statute, which confers jurisdiction of the Colorado courts over a nonresident if the nonresident commits a tortious act in the State of Colorado. Eschmann's petition for writ of certiorari states at page 3 that this issue "is one in which state courts of diverse jurisdiction have not heretofore reached similar results." However, the petition does not cite any state court decisions which have reached different results. It is instructive to note that the petition fails to cite any case from any jurisdiction which has held a long-arm statute to be unconstitutional.

The Colorado Supreme Court has considered the issue on a number of occasions, and has consistently upheld the constitutionality of its long-arm statute. The arguments advanced by petitioner regarding the "tortious act" provision of the long-arm statute have previously been considered and rejected by the Colorado Supreme Court, which has found the provision to satisfy the minimum contact requirement of due process. *Texair Flyers, Inc. v. District Court*, 180 Colo. 432, 507 P.2d 367 (1973); *Alliance Clothing, Ltd. v. District Court*, 187 Colo. 400, 532 P.2d 351 (1975); *Jenner & Block v. District Court*, \_\_\_\_ Colo. \_\_\_\_, 590 P.2d 964 (1979).

Colorado's statute is not unique. Many states have enacted long-arm statutes in the past twenty years. A common feature of these long-arm statutes is to predicate jurisdiction

upon the commission of a tort in the state. Colorado's long-arm statute contains a similar "tortious act" provision.

Similar "tortious act" statutes have been construed by numerous state and federal courts. The constitutionality of such statutes are uniformly if not universally recognized. Illustrative cases are: *Rebozo v. Washington Post Co.*, 515 F.2d 1208 (CA 5, 1975) (construing a similar Florida statute); *Duple Motor Bodies, Ltd. v. Hollingsworth*, 417 F.2d 231 (CA 9, 1969) (interpreting a similar Hawaii statute); *Honeywell, Inc. v. Metz Apparaterwerke*, 509 F.2d 1137 (CA 7, 1975) (an Illinois statute); *Velendra v. Regie Nationale des Usines Renault*, 336 F.2d 292 (CA 6, 1974) (a Michigan statute); *Bach v. McDonnell Douglas, Inc.*, 468 F.Supp. 521 (D.C. Ariz., 1979).

In product liability cases, where the nonresident manufacturer's act or omission outside the state results in injury within the state, it has been held that the presence of the product in the forum state and the occurrence of the injury in the forum state satisfy the minimum contact requirement of due process. *Ajax Realty Corp. v. J. F. Zook, Inc.*, 493 F.2d 818 (CA 4, Va.) cert. den., 411 U.S. 966; *State ex rel Western Seed Production Corp. v. Campbell*, 250 Ore. 262, 442 P.2d 215, cert. den. 393 U.S. 1093. See also, *Fulton v. Chicago, Rock Island & Pacific R.R.*, (CA 8, 1973) 481 F.2d 326, cert. den. 414 U.S. 1040.

The commentators appear to agree that tortious act statutes are constitutional. For example, see Currie, *The Growth of the Long-Arm: Eight Years of Extended Jurisdiction in Illinois*, 1964 U. of Ill. L. Forum 533 (1963). The author commented on the constitutional question as follows:

Indeed, the constitutionality of this assertion of jurisdiction today, could only be doubted by those determined to oppose the clear trend of the decisions. This situation is exactly that of the non-resident-motorist statutes, which were long ago upheld, except that the highways are not directly involved.

Although this Court has not passed upon a tortious act statute, a favorable indication may be found in dictum contained in *McGee v. International Life Ins. Co.*, 355 U.S. 220, 2 L.Ed 2d 223, 78 S. Ct. 199 (1957). In the second footnote of that opinion, this Court referred with approval to a state case which upheld a tortious act statute.

One court has stated that although the Supreme Court of the United States has not ruled directly on "tortious act" statutes, it has left little doubt such statutes will be held constitutional. *Etzler v. Dille & McGuire Mfg. Co.*, 249 F. Supp. 1 (W.D. Va. 1965).

## V. CONCLUSION

The constitutionality of long-arm statutes generally and tortious act provisions specifically have consistently been upheld. Colorado's tortious act statute is similar to those of other states, and its constitutionality has been upheld on a number of occasions.

Petitioner has not shown that the decision below by the Colorado Court of Appeals is not in accord with applicable decisions of this Court. Indeed, the logic of this Court's previous decisions indicate the contrary, and support the validity of long-arm statutes with tortious act provisions.

The petition for writ of certiorari should be denied.

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